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U-Haul Co. of Nevada, Inc., and International Association of Machinists & Aerospace Workers, Local Lodge 845, AFL-CIO. Case 28-RC-6159

February 9, 2004

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 7, 2003, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued on April 11, 2003. The tally of ballots shows 47 for and 25 against the Union, with 5 challenged ballots, an insufficient number to affect the results. The Board has reviewed the record in light of the exceptions¹ and briefs and has adopted the hearing officer's findings² and recommendations, and finds that a certification of representative should be issued.

1. We adopt the hearing officer's recommendation to overrule the Employer's Objection 1, which alleged that the Union engaged in objectionable conduct under the standard established in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), by making a preelection offer to employees to waive initiation fees. In so doing, we agree with the hearing officer that the union documents that

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the Employer's Objections 5 and 6, which allege, respectively, threatening conduct and appeals to racial and ethnic divisiveness by union agents.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957). We have carefully examined the record and find no basis for reversing the findings.

The Employer has also excepted to the hearing officer's decision asserting that the decision evidences bias and prejudice. Upon our full consideration of the entire record in these proceedings, we find no evidence that the hearing officer prejudged the case, made prejudicial rulings, or demonstrated bias against the Employer in her conduct of the hearing or her analysis and discussion of the evidence.

We note, however, certain factual errors in the hearing officer's findings that do not affect the outcome of this case. As the Employer points out, the hearing occurred in Las Vegas, not Phoenix. The record also indicates that the hearing officer erred in finding that Union Representative Dennis London was 210 feet from the Employer's building on election day. As discussed in detail in the text, this error does not affect the analysis or resolution of the electioneering issue.

were distributed to employees clearly stated a lawful waiver of initiation fees, i.e., the waiver would apply to all employees, not simply those who signed a union authorization card before the election. Further, union officials credibly testified consistent with the language in the documents. The possibility that one or two employees, who were not shown to be union agents, may have mischaracterized the Union's documents does not change the lawful nature of the Union's offer to waive fees.

2. In adopting the hearing officer's recommendation to overrule the Employer's Objection 2, we agree that the Union's document "guarantee[ing] it is illegal for the company to close or threaten to close the plant" if the Union won the election, did not amount to objectionable misrepresentation either under the Board's standard, as articulated in *Midland National Life Ins. Co.*, 263 NLRB 127 (1982), or under *Van Dorn Plastic Machinery, Inc. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984), as the Employer contends.

The Board does not probe into the truth or falsity of parties' campaign statements and will not set aside an election on the basis of misleading campaign statements, except in cases of forgery that preclude employees from recognizing campaign propaganda for what it is. See *Midland National Life Ins. Co.*, supra at 131-133. In other words, the Board will not set aside an election because of the substance of the representation, but may do so because of the deceptive manner in which it was made, a manner that renders employees unable to evaluate a forgery for what it is. The Sixth Circuit Court of Appeals has endorsed the *Midland* approach, but has carved out a narrow exception requiring an election to be set aside, even if no forgery is involved, "where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth." *Van Dorn Plastic Machinery, Inc. v. NLRB*, supra at 348. See also *Dayton Hudson Dept. Store v. NLRB*, 987 F.2d 359, 365 (6th Cir. 1993) (explaining that *Van Dorn* is a "narrow" limitation on *Midland*).

With regard to the "guarantee" document, forgery has not been alleged or shown. Accordingly, we cannot say that voters would have been confused as to the nature or origin of the Union's message. Thus, it does not rise to an objectionable misrepresentation under *Midland*. In our judgment, the language also does not run afoul of *Van Dorn*. While the document arguably reflects an erroneous reading of Board law, the document plainly emanated from the Union 2 days before the election. We agree with the hearing officer that voters reasonably would see the document as union propaganda and treat it as such. Indeed, the full hearing on this issue did not reveal any convincing evidence of voter confusion, much

less any confusion that would affect the result of the election. Accordingly, we find that the document contained, at most, a misstatement that was neither so pervasive nor so artful that it left employees unable to separate truth from untruth. *Van Dorn*, 736 F.2d at 348.³

3. In adopting the hearing officer's recommendation to overrule the Employer's Objection 4, which alleged that union representatives engaged in objectionable electioneering, we do not agree with the Employer that union observer Shaun Saunders' conduct was like that of the union observer in *Brinks, Inc.*, 331 NLRB 46 (2000). In *Brinks*, the observer explicitly instructed four employees, as they approached the observer table, to vote for the union and gave a "thumbs up" to certain other employees. The observer's conduct had a ripple effect on the election when an employee then turned and told other employees what the observer had instructed them to do. The observer also disregarded the Board agent's direction not to speak to employees, and he was duly admonished. Here, in contrast, as the hearing officer observed, Saunders' "thumbs up" and smiles to certain voters were not clearly linked to any instructions to vote for the Union. Indeed, the gesture was unaccompanied by any verbal exchange and could not reasonably be understood to convey any particular meaning. Further, although the Employer's observer was aware of Saunders' conduct, she did not report it to the Board agent at the time, despite having been instructed to report any perceived irregularities.

The Board discourages, but does not prohibit, union and employer observers from wearing campaign insignia. *Larkwood Farms*, 178 NLRB 226 (1969) ("Vote No" message on hat worn by employer's observer not objectionable).⁴ Whether or not giving a "thumbs up" and smiling at voters is wise or desirable conduct on the part of an observer, it does not by itself constitute objection-

able conduct. Under the circumstances of this case, the conduct does not warrant overturning the election.

We also disagree with the Employer that Union Representative London's conduct near the parking lot during the election was objectionable under the court's view in *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001). In *Nathan Katz*, union officials sat in a car in the declared no-electioneering area directly outside the entrance to the site—a location every eligible voter would have to pass in order to vote—for the duration of the election. The union officials "motioned, gestured, and honked at the employees as they passed the car." 251 F.3d at 991. Here, there is no evidence that London was in a declared no-electioneering area. All but a handful of eligible voters were already inside the building when the voting period began and by the time London arrived in the parking lot. The parking lot was not readily visible to employees inside the building or in the polling area, which was in an upstairs breakroom at some remove from the parking lot. As the hearing officer found, neither London nor any other union official did anything to draw attention during the 35 minutes London was in the parking lot.

In concluding that London did not engage in objectionable conduct, we do not rely on the hearing officer's finding that London was 210 feet from the building at the time he conversed with voters. The record instead indicates that London was between 30 and approximately 100 feet from the outside edge of the building at the time. Although the record does not reveal London's exact location in relation to the building, evidence supports the hearing officer's finding that employees inside the building were unable to see London from their work areas without straining and, as noted above, that voters could not see London from the polling area. Accordingly, even if London was only 30 feet from the building, we agree with the hearing officer that London's presence did not run afoul of *Milchem, Inc.*, 170 NLRB 362 (1968). We recognize that London spoke to a handful of voters. However, these conversations did not take place in the polling area, the waiting area, or near the line of voters. Thus, they were not objectionable. See *Harold W. Moore & Son*, 173 NLRB 1258 (1968) (no objectionable electioneering where conversations were 30 feet from the building entrance, with voting area 30 feet inside entrance).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Association of Machinists & Aerospace Workers, Local Lodge 845, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

³ With regard to the part of Objection 2 addressing the "Yes" petition, we note that the hearing officer mistakenly cited the *Van Dorn* decision as holding that minor deviations from a perfect recording of employee sentiment do not constitute the type of deception contemplated in *Midland*. That statement should have been attributed to the Board in *Champaign Residential Services*, 325 NLRB 687 (1998), which addressed *Van Dorn*.

With further respect to this part of Objection 2, Member Schaumber disagrees with the hearing officer's conclusion that employees could readily observe the fact that several employees signed the "Yes" petition more than once. However, he agrees that the facts in this case do not establish objectionable conduct.

⁴ Chairman Battista and Member Schaumber do not pass on the validity of this precedent. Inasmuch as Board policy discourages such observer conduct, it may be prudent to give meaning to that policy by prohibiting the conduct. However, as no party expressly seeks to overrule extant Board precedent, they apply that precedent here.

All full-time and regular part-time brake/tire specialists, detail specialists, engine specialists, mechanic express specialists, PM inspection specialists, pre/post inspection specialists, transmission specialists, vanbody specialists, mobile repair specialists, parts clerks, parts specialists, transfer drivers, repair dispatch specialists, and schedulers employed by the Employers at and out of its 1900 South Decatur Boulevard, Las Vegas, Nevada, and 989 South Boulder Highway, Henderson, Nevada repair facilities; excluding all other employees, office clerical employees, including the senior clerk, professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. February 9, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD